THE ANATOMY OF A MEDICAL MALPRACTICE CASE

While each medical malpractice case has its unique aspects, most professional liability cases take on a familiar, predictable pattern. Many components are common to any civil lawsuit and some have special relevance to malpractice actions. This brief outline is intended to give a physician an overview of what is involved in a medical malpractice case so he or she can know what to expect during the different stages of a lawsuit.

I. PLEADINGS

In any civil lawsuit, the pleadings basically consist of a petition, filed by the plaintiff, and an answer, filed by the defendant. In the petition, the plaintiff generally outlines the allegations made against the doctor sued. These pleadings can be specific, but in most circumstances are quite general and vague. The plaintiff's petition also generally describes the type of damages which the plaintiff believes have been suffered because of some alleged act of malpractice.

Under Texas law, the plaintiff’s petition cannot specify a monetary amount claimed. It must simply state that the amount claimed “exceeds the jurisdictional limits of the court.” The specification of exactly how much is sought from the doctor usually occurs later during the progress of the case by an amended petition or by correspondence from the plaintiff’s lawyer.

The plaintiff usually alleges “negligence” on the part of the physician. Claims are made that some act or omission on the part of the defendant physician fell below the expected standard of care or was different than what a reasonably prudent physician would have done under the same or similar circumstances. The plaintiff’s petition may also contain
allegations of a special legal term, gross negligence. Gross negligence means more than the simple act of making a mistake. It means that the plaintiff’s lawyer is accusing the doctor of reckless, willful or wanton conduct as opposed to a mere error in judgment.

Since all policies of medical malpractice insurance cover only acts of “negligence” and exclude coverage for “gross negligence”, whenever pleadings alleging gross negligence are filed, the medical malpractice insurer must inform the doctor that they are not covered for such allegations. The same information must be given to the physician if the plaintiff specifies that they are suing the physician for a sum of money which exceeds the monetary limits of the doctor’s insurance policy.

As indicated, some actions taken by the plaintiff can create additional "exposure" for the doctor above and beyond the coverage afforded by their malpractice carrier. This may prompt some doctors to hire an attorney to work with the counsel employed by the insurance company to protect their “excess” interest. It should be remembered that the defense counsel employed by the insurance company to represent the doctor owes their first loyalty to the physician, not the insurance company. However, when there are questions of excess exposure defense counsel employed by the insurance company always welcomes any input by a personal attorney employed by the doctor.

The defendant’s attorney must also file a pleading which is called an answer. In this document, the defendant may request more specificity as to the allegations made. The answer also contains statements denying the allegations and requests the plaintiff to prove each and every aspect of the case. From time to time there may be additional pleadings of special importance the defendant’s attorney may wish to file with the court. These may
include statements which assert that some other party, possibly even the plaintiff, is responsible for the damages alleged. Some defenses such as the timeliness of the suit may also be raised to prevent or limit the plaintiff’s recovery of damages. Regardless of what the specifics of the case are, the defendant’s pleadings typically remain short and deny all of the allegations made by the plaintiff.

During the course of the suit, amended pleadings may be filed. The plaintiff may make new allegations or amend to make allegations more specific. The defendant may also amend his or her answer if new defensive matters need to be asserted.

II.

DISCOVERY

Discovery is a stage of the case which can take a very long time. It is a time when both sides attempt to “discover” what the other side intends to use in evidence during the trial. It is during this stage that the parties collect pertinent medical records of other treating physicians. The parties also exchange written questions or “interrogatories” which must be answered in writing and given to the opposing attorney after they have been sworn to by the party to whom they are directed. The parties may also file “requests” for production of certain documents or other materials which may be relevant to some aspect of the case.

Discovery of the case is also a time when depositions occur. A deposition is when an attorney is allowed to question a party or witness in a case. This oral examination becomes a part of the records of the court and can be read or referred to during the trial of the case.

Since interrogatories and depositions are the main components of discovery, a little more detail is needed in describing each one of these important aspects of a malpractice case.
A. **Interrogatories**

As indicated above, interrogatories are written questions which can be directed to the defendant doctor which requires a written response. These answers will have to be sworn to and given to opposing counsel. Although some extensions can be obtained, the answers are typically due 30 days from the date that they are received by the defendant’s attorney.

During the course of a case, if interrogatories are received they will be sent to the physician to be answered. The attorney may answer some legal questions or assert objections to improper inquiries. These responses will be carefully reviewed by the attorney and defense counsel as the final draft of the answers are sworn to and filed with the court. The content of these answers is extremely important since it forms the basis of the defense of the doctor and becomes available for study and perusal by the adverse attorney.

B. **Depositions**

Depositions are oral examinations of various parties and witnesses. Whenever a defendant doctor’s deposition is requested, it is very important for the physician to thoroughly review his or her memory and records relating to the case. Defense counsel will also carefully and closely work with the doctor in preparing for the anticipated areas of questioning. This private pre-deposition conference involves several hours of intensive work by the doctor and defense counsel before the plaintiff's attorney begins questioning. During the conference, the doctor will be instructed on the best method of answering questions and also warned about potential
pitfalls and traps which may be waiting for them when he or she is questioned by the adverse party’s attorney.

The physician’s attorney will also typically request and take depositions of the plaintiff or other witnesses identified by the plaintiff. Questioning by defense counsel will attempt to develop important facts which will assist the doctor in defending the case and discovering other favorable evidence.

When depositions are taken, any party to the lawsuit has the right to be present. It is the usual practice that only the party to be questioned and the lawyers for all the parties attend each deposition. On occasion, it may be helpful to have the defendant physician present when a plaintiff or some other witness is deposed. Whether the doctor attends such other depositions will depend upon the preference of the doctor and the advice of the defense attorney.

III.

EXPERT WITNESSES

Since the plaintiff is making allegations of professional negligence, it is incumbent for the plaintiff to present an expert witness who is critical of the defendant doctor. In most instances the law requires that these experts prepare reports outlining their criticisms. Many times they are also presented for deposition during which the defense lawyer vigorously questions the witness about the areas of criticisms. The negative opinions are explored to raise questions as to their credibility and accuracy. The ultimate goal is to completely discredit any adverse testimony offered against the physician. The physician sued often
assists the lawyer in evaluating reports of the adverse experts and in preparing for and analyzing the depositions of the witnesses once they have been taken.

The doctor’s lawyer will also be consulting with and possibly identifying experts who are supportive of the defendant's care. In most circumstances, the physician should be seeking out knowledgeable individuals who might be willing to review medical records and testify in a supportive way. The names of these individuals should be suggested to the defense lawyer. In trying to assemble witnesses supportive of the doctor, the defense attorney plays a very important role. Since any communication between the defendant doctor and a potential expert witness could be “discoverable” by the plaintiff’s attorney, the defense lawyer usually takes the initiative in contacting the potential experts and getting them ready for trial. This way, communications with the expert can be protected and retain the objectivity which lends credibility to the supportive witness. The opinions of defense witnesses will be viewed as impartial, objective thoughts of individuals who have not been inappropriately influenced by the defendant physician.

One other word about expert witnesses deals with the timing when they are designated. In the usual course of events, designation of experts occurs after the records have been collected and after the parties have been deposed. The law requires the plaintiff to designate experts first. After all, since the plaintiff has made the allegations, he or she has the obligation to come forth with evidence to prove the complaints. At times it may be difficult for the plaintiff’s lawyer to find an expert willing to support the allegations. If that is the case, the defendant may use certain procedural tools to get the case dismissed.
Experts called on behalf of the physician need to be developed as early as possible. This does not mean that they will be identified to the plaintiff’s lawyer immediately. It is best to have these experts “waiting in the wings” for formal designation at the appropriate time. There are occasions when no outside retained expert may be necessary for the defendant. The defendant doctor, and possibly other physicians involved in the case, may be more than enough to support the doctor’s care.

In summary, the defendant in a medical malpractice case should compel and require the plaintiff to come forth with at least one witness who will back up the allegations made. At the same time, the defendant should be carefully grooming individuals who, if called upon, will be ready, willing and able to respond to the plaintiff’s expert and support the accused physician. These valuable witnesses will assist the physician and defense counsel in discrediting adverse witnesses and educating the jury as to medical realities. When properly taught, jurors can understand the defendant’s case and hopefully will decide it favorably for the doctor.

IV.

MEDIATION

After discovery has been substantially completed and expert witnesses have been developed and possibly deposed, it is not uncommon for a case to be scheduled for mediation. Mediation is a common method of attempting to accomplish the pre-trial disposition of lawsuits by settlement. In most cases, the judge will order the parties to mediation prior to a case preceding to trial. Basically, mediation is an informal forum in which an impartial person (the “mediator”) facilitates communication between parties to
promote settlement. A mediation usually consumes one day=s time and is usually held at a lawyer’s office.

Typically, the doctor, defense counsel, and a representative of the insurance company will attend the mediation. All other parties, their counsel and insurance representatives are also required to attend. No formal testimony is presented during the mediation, in fact, all communications are confidential and cannot be used in any way at trial. The physician’s role is mainly to attend and participate with counsel and the insurance company representative in making decisions about settlement. Depending on the case, mediation can be an effective tool to resolve lawsuits without a trial.

V.

SETTLEMENT EVALUATION AND SETTLEMENT DISCUSSIONS

As the case approaches trial, there is usually some discussion about possible settlement of the dispute. Sometimes settlement is a welcomed result of many months of difficult negotiations. On other occasions, the defendant physician may choose to refuse to settle any case under any circumstances. Whatever the status of the particular lawsuit may be, the parties, insurance company and the physicians should always be evaluating the prospects of a reasonable resolution of the controversy if at all possible. Since the trial of any case exposes all parties to potential risks, settlement may be an acceptable option. The appearance of the parties, the sympathetic nature of the injuries, the skill of the plaintiff’s lawyer, the liberality of the county where the case is tried, and many other factors all must be considered in evaluating settlement.
Whenever settlement is demanded by the plaintiff’s attorney, the doctor is advised. Under most insurance policies, the physician must consent before any money is offered to the plaintiff. The insurance company, defense counsel and the doctor all participate in suggesting and evaluating what an appropriate settlement response should be in that unique case.

One last general thought about settlement is that resolving a case by agreement does not constitute an admission of guilt by the doctor. Most settlement agreements expressly state that is not an admission of guilt. The papers describe the settlement as a compromise reached between the parties to resolve a disputed matter in order to avoid the inconvenience, expense and uncertainties further litigation would entail.

VI. 

TRIAL SETTINGS

Because of the overcrowded condition of the courts, there are many times when a lawsuit will be set for trial and be reset for one reason or another. Most of the time, the courts are required to set many cases for any particular week. During that week, there can be a variety of reasons which cause a trial to be postponed. While this continual delay may be frustrating, there is little or nothing which defense counsel can do to assure a definite date for trial. In some counties and under certain circumstances the court may establish a special setting. A special setting means that no other cases will be called ahead of the special case on that day. These settings are definite and should be planned for as the actual date of trial.

As the physician is informed of trial settings, he or she should advise defense counsel immediately if there are unavoidable conflicts which would prevent the doctor from being
available for trial if the matter was actually reached for trial on the given date. As the trial
date approaches, defense counsel will be in touch with the defendant doctor to advise as to how realistic the chances are that the case will actually be reached for trial at that setting.

VII.

TRIAL PREPARATION

As the case approaches trial, the defendant physician should carefully review his or her own deposition testimony and all of the medical records applicable to the case. The lawyer employed to represent the doctor will also be in close contact with the doctor to go over the specifics of the case and finish trial preparations. Since it is the obligation of the plaintiff to go first in the trial of the lawsuit, some of the last minute trial preparation may be done during the evenings when the case is actually in the process of being tried.

The unique complexities of individual lawsuits make a complete discussion of trial preparation difficult. The most important aspect of trial preparation is for the doctor to be thoroughly familiar with the case and his or her previous testimony. The physician should also remember that the courtroom is the “operating room” of the attorney. To the greatest extent possible, the doctor should follow the suggestions and instructions of defense counsel so the case can be properly presented to the judge and jury.

VIII.

TRIAL

Trial is the culmination of all of the various stages of discovery which have been outlined above. By the time of trial, all of the pleadings have been placed in final form, all discovery has been answered and all of the expert witnesses have been identified and
deposed. All reasonable and acceptable means of resolving the case by settlement have been exhausted.

Trial begins with selection of a jury and is followed by opening statements in which the attorneys give a general overview of what they expect to prove during the course of trial. After opening statements, the plaintiff presents evidence and the defendant is allowed to cross-examine and question witnesses called. When the plaintiff completes his or her case, they rest. The defendant then puts on any evidence which has not already been developed during the previous questioning of witnesses called during the plaintiff’s case.

After all of the evidence is completed, the court prepares what is known as the Court’s Charge. The charge of the court is a written document which consists of questions submitted to the jury for answering. These questions will inquire whether, based upon the evidence, the jury believes the doctor was negligent, whether such negligence was a proximate cause of damage and how much money should be awarded to fairly and reasonably compensate the plaintiff. At the end of the trial the Court’s Charge is read to the jury and the attorneys are allowed to give their final arguments. During this argument, the attorneys will try to convince the jury to answer the questions in a way which favors their respective clients. After the arguments the jury retires to the jury room and answers the questions contained in the Court's Charge. In Texas courts, ten of the twelve members of the jury must agree to all of the answers contained in the jury’s verdict. After the verdict is received the court then interprets and applies the answers of the jury to render what is called a final judgment. In other words, the court looks at the verdict and decides who has won the case based upon the answers of the jurors.
SOME CONCLUDING THOUGHTS

It is hoped that the foregoing outline will help the physician understand what can be expected during the course of a typical medical malpractice case. Like a patient suffering from a prolonged illness that he may not understand, a physician is unaccustomed to being a defendant in a lawsuit and must endure certain things as the case runs its course. Although it may not remove the pain, anger or frustration experienced by a doctor accused of malpractice, it is hoped a general understanding of what a lawsuit entails may remove some of the questions and alleviate the fear of the unknown. The ultimate goal of defense is to properly respond to each aspect of discovery, aggressively develop the physician’s evidence as the case progresses and win a victory at trial. With good preparation and teamwork, the most difficult cases can be managed and resolved in a manner which is acceptable to the physician.